Filed 5/7/13 In re E.H. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re E.H., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B242863 (Super. Ct. No. J068576) (Ventura County)
VENTURA COUNTY HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. S.S. et al., Defendant and Appellant.	

Parents appeal an order denying Father presumed father status, bypassing reunification services for Mother and terminating parental rights. (Welf. & Inst. Code, § 366.26.)[1] We affirm.

FACTS

S.S. (Mother) has an extensive history of drug abuse, including at least 18 drug-related arrests. In addition, she suffers from schizophrenia, depression and anxiety. She does not comply with mental health appointments and treatments.

[1] All statutory references are to the Welfare and Institutions Code unless otherwise specified.

E.H. (Father) also has an extensive history of drug abuse, including at least 27 drug-related arrests. He also admits to being an alcoholic.

E.H. (E.) was born in 2011. At birth, she had symptoms of withdrawal from methadone. The doctor opined she would die if she went home with Mother. E. was detained in the neonatal intensive care unit at the hospital.

On November 30, 2011, a detention hearing was held. At the hearing, Father claimed paternity. He did not sign the birth certificate because he was incarcerated when E. was born. The court determined he is the alleged father. The court detained E. and ordered visitation and family reunification services.

On December 17, 2011, E. was placed in foster care with a nurse who was trained to care for drug-exposed infants. The nurse reported E. continued to show signs of withdrawal.

On January 19, 2012, a contested jurisdiction and disposition hearing was held. At the hearing, Father requested and the court ordered paternity testing. The hearing was continued to February 22, 2012, for other reasons.

At the February 22 hearing, the Ventura County Human Services Agency (HSA) reported Mother was scheduled to submit to substance abuse testing on January 18 and 31 and February 14, 2012. The January 18 test results were positive for amphetamine, methamphetamine and methadone. Mother failed to submit to testing on the other two dates.

Mother was supposed to be attending Alcoholics Anonymous and Narcotics Anonymous (AA/NA) meetings. But she did not know what a sponsor was and admitted she used heroin as recently as April 2011.

The trial court sustained the petition and concluded that services should not be provided pursuant to section 361.5, subdivision (b)(12). the matter was set for a section 366.26 hearing (.26 hearing). The court did not make findings regarding Father.

On April 16, 2012, the court held a hearing on Father's paternity. HSA reported a 99.99 percent probability of paternity by Father. HSA also reported Father

remained in a relationship with Mother. He said he planned to marry her. When asked how he would protect E. from Mother, he responded that he would not take E. from her.

HSA reported that Father's parole officer told a social worker on April 9, 2012, that Father had not reported, his whereabouts were unknown, and he remained a "parolee at large." His parole had been suspended and a warrant for his arrest had been issued.

An HSA memorandum stated Father was arrested on April 27 and released on May 3, 2012. Father did not contact HSA about his arrest or to inquire about visitation.

HSA informed Mother and Father that their visits with E. would be reduced from once a week to twice a month. E. cries uncontrollably during the visits. The parents were referred to a class on caring for drug-exposed infants, but they did not attend.

HSA recommended that services not be provided to Father. On May 16, 2012, the court held a contested paternity hearing. Father requested that the court find him to be the presumed father and order reunification services for him. The court denied Father's request. The court found that he could not establish he is the presumed father pursuant to Family Code section 7611.

On July 12, 2012, the court held a section .26 hearing. The court determined E. is adoptable and terminated parental rights.

DISCUSSION

I.

Father contends the trial court erred in denying him presumed father status.

A biological father is one whose biological paternity has been established, but who has not achieved the status of presumed father. (*Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 596.) The court may order services for a biological father but only if the court finds the services will benefit the child. (§ 361.5, subd. (a).) Here Father requested no such finding.

A presumed father is entitled to custody and family reunification services. (*In re Zackaria D.* (1993) 6 Cal.4th 435, 448-449.) A presumed father is one who meets the requirements of Family Code section 7611. Father argues he meets the requirement of subdivision (d) of that section: "He receives the child into his home and openly holds out the child as his natural child." (*Ibid.*)

The person claiming to be a presumed father has the burden of establishing the necessary elements. (*In re A.A.* (2003) 114 Cal.App.4th 771, 782.) We review the trial court's determination under the substantial evidence test. (*Ibid.*)

Father claims that he lived with Mother prior to E.'s birth, assisted in preparing Mother for birth, and requested paternity testing, visitation and custody. Father may have satisfied the requirement that he openly holds out the child as his own. But he failed to carry his burden to show that he received E. into his home.

Father points to no evidence E. spent even a day in his home. In fact, Father was incarcerated when E. was born. He was in hiding from his probation officer from April 9 to April 27, 2012, when he was arrested. He was incarcerated again from April 27 to May 3, 2012. That Father spends substantial amounts of time either incarcerated or hiding from authorities shows he is incapable of providing a stable home for E. The evidence also shows that Father could not care for E. even if he had custody. His visits were reduced from once a week to twice a month because E. cried uncontrollably during the visits. He refused HSA's suggestion that he take a class on caring for drug-exposed infants. Father's choice to engage in illegal activities does not excuse his failure to take E. into his home. The trial court did not err in determining Father is not a presumed father.

Father claims he qualifies as a presumed father under *Adoption of Kelsey S.* (1992) 1 Cal.4th 816. There, the court concluded that a man who "demonstrates a full commitment to his parental responsibilities- emotional, financial and otherwise" and who is prevented from taking the child into his home by the child's mother, is entitled to a showing of unfitness as a parent before his parental rights can be terminated. (*Id.* at p. 849.)

Father was not prevented by Mother from taking E. into his home. Nor did Father demonstrate a "full commitment" to his parental responsibilities. Instead, any commitment Father may have made to his parental responsibilities was subordinate to his choice to engage in criminal activities.

Father's reliance on *Santosky v. Kramer* (1982) 455 U.S. 745, and *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, is misplaced. Neither case concerns the rights of mere biological fathers. (*In re Jason J.* (2009) 175 Cal.App.4th 922, 935.) Similarly, Father's reliance on *In re Gladys L.* (2006) 141 Cal.App.4th 845, *In re G.S.R.* (2008) 159 Cal.App.4th 1202, and *In re Frank R.* (2011) 192 Cal.App.4th 532, is misplaced. All those cases involve presumed fathers.

II.

Mother contends the trial court failed to advise her of her right to file a statutory writ when it set the .26 hearing.

Mother was present in court with her counsel when the court set the .26 hearing. The court told Mother: "You have the right to appeal what I have just ruled, and [counsel for Mother] will give you some forms and some information from the bailiff on how you can file an appeal." The court's minute order states: "[T]he clerk has given the mother the JV820 and JV825 forms in open court."

California Rules of Court, rule 5.590(b) provides in part: "When the court orders a hearing under . . . section 366.26, the court must advise all parties and, if present, the child's parent, guardian, or adult relative, that if the party wishes to preserve any right to review on appeal of the order setting the hearing under . . . section 366.26, the party is required to seek an extraordinary writ by filing a *Notice of Intent to File Writ Petition and Request for Record* (California Rules of Court, Rule 8. 450) (form JV-820) or other notice of intent to file a writ petition and request for record and a *Petition for Extraordinary Writ* (California Rules of Court, Rules 8.452, 8.456) (form JV-825) or other petition for extraordinary writ. [¶] (1) The advisement must be given orally to those present when the court orders the hearing under . . . section 366.26."

Here the trial court advised Mother of her right to "appeal" instead of her right to seek a "writ." The difference is not substantial. Most lay people know generally that an appeal asks a higher court to review a lower court's ruling. Most lay people have no idea what a writ is. If anything, as used in this context, the word "appeal" more clearly conveys to a lay person the essence of a party's right than the word "writ." In addition, the court directed Mother's attention to forms the bailiff would hand her. The minute order shows that Mother was handed form JV-820. That form advised Mother of her right to seek a writ and the deadlines therefor. It is not material whether she was handed the forms by her counsel, the court clerk or the bailiff.

The trial court substantially complied with the requirements of California Rules of Court, rule 5.590(b). Mother has no right in this appeal to raise issues relating to the trial court's order terminating services and setting a .26 hearing. (*In re Tabitha W.* (2006) 143 Cal.App.4th 811, 815-816.)

In any event, even if Mother was not given proper notice any error was harmless. The court's order bypassing services and setting a .26 hearing was supported by substantial evidence.

Mother argues that setting the .26 hearing is premature when reunification services are being provided to one parent. (Citing § 361.5, subd. (f).) She points out that the trial court had not yet ruled on Father's claim to be a presumed father when the hearing was set. But the trial court ultimately ruled that father is not a presumed father, and is not entitled to services. We uphold that ruling. The setting of the .26 hearing was not premature.

The trial court bypassed reunification services under section 361.5, subdivision (b)(13). That subdivision states in part that reunification services need not be provided to a parent who "has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court's attention . . . ."

Here there is evidence Mother has a history of extensive, abusive and chronic use of drugs that includes at least 18 drug-related arrests. In 2006, the court ordered her into a drug treatment program pursuant to Proposition 36.

Mother argues she did not resist court-ordered treatment during the three-year period immediately prior to filing the petition. But the treatment does not need to occur during the three-year period; only the resistance to the treatment. (*Laura B. v. Superior Court* (1998) 68 Cal.App.4th 776, 780.) The resistance may consist of resuming drug use. (*Ibid.*)

Here Mother admitted on November 22, 2011, that she started using heroin "a couple years ago" and used heroin most recently for a couple of weeks in April 2011. In addition, Mother tested positive for drugs in January 2012 and failed to take tests in January and February 2012. There is ample evidence to support the trial court's order bypassing services.

Mother argues that she should have been provided reunification services under section 361.5, subdivision (c). That subdivision allows denial of reunification services under subdivision (b)(13) "unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child."

Mother claims she has shown reunification is in the best interest of E. Mother concedes she has the burden of proof. (*In re William B.* (2008) 163 Cal.App.4th 1220, 1227.) Mother cites the evidence most favorable to herself, in support of her claim.

But we must take a different view of the evidence. "In viewing the evidence, we look only to the evidence supporting the prevailing party. [Citation.] We discard evidence unfavorable to the prevailing party as not having sufficient verity to be accepted by the trier of fact. [Citation.] Where the trial court or jury has drawn reasonable inferences from the evidence, we have no power to draw different inferences, even though different inferences may also be reasonable. [Citation.] The trier of fact is not required to believe even uncontradicted testimony. [Citation.]" (*Rodney F. v. Karen M.* (1998) 61 Cal.App.4th 233, 241.)

Mother claims she sought treatment for her drug addiction. But she did not begin treatment until February 17, 2012, just five days before the jurisdiction and disposition hearing. She tested positive on January 18, 2012, and failed to take tests on January 31 and February 14, 2012. In spite of overwhelming evidence to the contrary, she told the court, "I don't have a drug problem."

Mother claims that even before the petition was filed, she sought and received help for her mental illness. But her psychiatrist told HSA that she was "bad" about keeping appointments, and described her as "really sick."

Finally, Mother's visits with E. had to be reduced because E. cried uncontrollably during the visits. HSA recommended a class on caring for drug-exposed infants, but Mother declined to attend.

Mother failed to carry her burden of showing reunification is in E.'s best interest.

III.

Mother contends HSA failed to comply with the Indian Child Welfare Act (ICWA; 25 U.S.C., § 1901 et seq.)

Mother and maternal grandmother told the court at the detention hearing that the maternal grandfather had Native American ancestry. They told the court that the maternal great aunt, N.S., knew the tribe with which he was affiliated.

HSA did not interview N.S., and did not include her name on the ICWA notice in the section designated for other relatives who might be able to trace the child's ancestry. HSA concedes this was error.

We grant HSA's motion to augment the record to show HSA has remedied the error while the appeal was pending. (See *In re C.D.* (2003) 110 Cal.App.4th 214, 226.)

HSA interviewed N.S. She was able to give the name of Mother's paternal grandfather, but she was unable to provide any specific tribe. HSA mailed revised notices to the Bureau of Indian Affairs, including all available information relating to E.'s Indian ancestry.

The trial court held a hearing. It found HSA gave notice as required by ICWA. The court determined that E. is not an Indian child and that ICWA does not apply.

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Ellen Gay Conroy, Judge

Superior Court County of Ventura

Joseph T. Tavano, under appointment by the Court of Appeal, for Defendant and Appellant E.H.

California Appellate Project, Jonathan B. Steiner, Anne E. Fragasso, under appointment by the Court of Appeal, for Defendant and Appellant S.S.

Leroy Smith, County Counsel, Linda L Stevenson, Assistant County Counsel, for Plaintiff and Respondent.